

p 517-346-6300 August 14, 2009

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Michigan Supreme Court
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Re: ADM File No. 2008-13 – Proposed Rule 1.15A of the Michigan Rules of Professional Conduct

Dear Mr. Davis,

Having reviewed the commentary that has been filed thus far in response to the Court's order, the State Bar believes that it would be useful to provide the commentary that was sent with the original proposal as it may allay some of the concerns being expressed by others.

Scope of Notification

The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer must correct and explain overdrafts. The provision intends to provide an early warning of improprieties so that corrective action may be taken.

Automatic reporting of all overdrafts makes notification by a financial institution administratively simpler than if the financial institution had to determine which overdrafts to report. An institution that receives an instrument or other debit to the account for payment against insufficient funds need not evaluate whether the circumstances require that notification be given; it merely provides notice. In the case of a dishonored instrument or other dishonored debit, the financial institution may submit a copy of the dishonored instrument or evidence of the other dishonored debit and a copy of the notice of dishonor it sends to the account holder to the Attorney Grievance Commission if the notice of dishonor contains the information specified at paragraph D of the proposed rule, so the Attorney Grievance Commission (AGC) may determine whether further action is warranted.

Costs of Notification

As is the practice in other states requiring trust account overdraft notification, the financial institution would directly bill the lawyer for the costs of providing the reports and records required by this rule or the lawyer could consent to the deduction of these charges from the lawyer's business account held at the financial institution.

Overdraft Protection

Because the purpose of TAON rules is to provide an early warning of improprieties, notification is still required in situations where the trust account carries overdraft protection, either through a line of credit or through a direct link with the lawyer's business account. Of course, lawyers may not use trust account funds as overdraft protection on any other account.

Coordination with Rule 1.15

Under the proposed Rule 1.15A, all client trust accounts, including IOLTA accounts, must be at a financial institution which have been "approved" because they have agreed to report overdrafts. This "approved status" is separate from and does not incorporate "eligible financial institution" status under Rule 1.15 or the Michigan Supreme Court-approved Attorney IOLTA Guidelines, which have a separate requirement that lawyers may only keep IOLTA accounts at financial institutions that meet the requirements of Rule 1.15.

Operational Procedures

The proposed rule calls for the State Bar of Michigan to establish guidelines for the process for approval and termination of approved status for financial institutions and for other operational procedures to effect this rule. These guidelines may specify the approval and termination notification process and under what circumstances approved status will be withdrawn. For instance, the guidelines might state that approved status may be revoked where the institution demonstrates a "pattern of neglect or showing of bad faith" rather than an inadvertent failure to report an overdraft, or they may describe the manner in which lawyers are notified when their financial institution's approved status is terminated. See, e.g., *Overdraft Implementation Guidelines*, 115 N.J.L.J. (215/85) at 1. As we have emphasized in all our communications with the Court on TAON, the State Bar does not intend to deny or revoke approved status for inadvertent mistakes. In such instances, the financial institution and the AGC should work together as needed so that any AGC record about the account(s) or lawyer(s) involved is promptly corrected.

Effective Date

The State Bar has asked that the rule become effective six months from the date of issuance. On the basis of the experience of other jurisdictions we believe that this time period is sufficient for effective communication to all those affected by the new rule.

Sincerely,



Janet K. Welch
Executive Director